UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RONTEZ MILES, Plaintiff, v. THE NATIONAL FOOTBALL LEAGUE and JOHN DOES 1-5, Defendants.	**Civil Action No. 2:19-cv-18327-CCC-MF** JUDGE CLAIRE C. CECCHI JUDGE MARK FALK **(ORAL ARGUMENT REQUESTED)** **Motion Day: November 18, 2019**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

Plaintiff Rontez Miles ("Plaintiff"), a professional football player employed by the New York Jets, filed this action against the National Football League ("NFL") for damages arising out of an injury he sustained during an NFL game. Although Plaintiff's Complaint asserts claims of "disability discrimination" and "negligence," in reality, his claims concern a workplace injury that, on their face, are preempted by the NFL Collective Bargaining Agreement and barred by workers compensation exclusivity. In addition, the Complaint fails to state a discrimination claim under either state or federal law. Accordingly, even accepting Plaintiff's allegations as true, the Court should dismiss the Complaint.

BACKGROUND

A. Plaintiff's Employment Under the NFL Collective Bargaining Agreement

Plaintiff is a professional football player employed by the New York Jets (the "Jets"). Compl. ¶ 1. The NFL is a professional sports league consisting of thirty-two Clubs, including the Jets. Compl. ¶¶ 2-3. The National Football League Players Association ("NFLPA") is the exclusive bargaining representative of all NFL players, including Plaintiff. Compl. ¶ 7.

Plaintiff, the Jets, and the NFL are all bound by a collective bargaining agreement ("CBA") governing the terms and conditions of employment of NFL players. Compl. ¶ 8.[1] The

[1] The court may consider the CBA and NFL Rules because Plaintiff expressly refers to and relies on them in his Complaint. *See* Compl. ¶ 8 (alleging that Plaintiff's employment "was in accordance with a collective bargaining agreement between the NFL and the NFLPA"); ¶¶ 9-11 (referencing NFL rules, regulations, policies and procedures, including uniform and equipment rules). In resolving a motion to dismiss, courts may analyze documents that are "integral to or explicitly relied upon in the complaint" without converting the motion into one for summary judgment. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997); *see also Prima v. Darden Rests., Inc.*, 78 F. Supp. 2d 337, 342-43 (D.N.J. 2000) (considering a commercial at issue in an action for wrongful imitation as "referred to in the complaint."); *Sullivan v. Sovereign Bancorp., Inc.*, No. Civ. A. 99-5990. 2001 WL 34883989, at

CBA governs the respective rights and responsibilities of the NFL, the Clubs, the NFLPA, and the players with respect to, among other subjects, player health and safety, player attire and equipment, and the remedies and benefits available to players in the event of an injury sustained while performing services under an NFL Player Contract, including during the course of an NFL game. Compl. ¶¶ 8-9; *see generally* Attachment A to the Declaration of Lawrence P. Ferazani, Jr. in Support of Notice of Removal (ECF No 1-2)) ("CBA"). All NFL players and Clubs are required to use the standard NFL Player Contract, which is expressly part of the CBA. CBA App. A ("NFL Player Contract").

As alleged in the Complaint, all NFL players and Clubs, including Plaintiff and the Jets here, are obligated to follow the rules promulgated by the NFL concerning the operation of the game. *See* Compl. ¶¶ 5, 9 (alleging that the NFL "promulgated rules, regulations, policies and procedures controlling most aspects of conduct of business of [the 32 Clubs], their players and staff," including rules "which players such as Plaintiff [] are required to follow in order to play football in the NFL"). The NFL "rules" referenced in Plaintiff's Complaint are expressly incorporated into the CBA and all NFL Player Contracts. *See* CBA Art. 1 (defining "NFL Rules" as "the Constitution and Bylaws, rules and regulations of the NFL"); NFL Player Contract ¶ 14 (acknowledging that "the [NFL] functions with certain rules and procedures expressive of its

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*4 (D.N.J. Jan. 19, 2001) (incorporating merger agreement and its affiliated agreement based on plaintiffs' "frequent reference" to the documents and their relation to plaintiffs' theory of the case). "Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied." *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993); *Dykes v. Se. Pa. Transp. Auth.*, 68 F.3d 1564, 1566 n.3 (3d Cir. 1995) (considering collective bargaining agreement omitted from the plaintiff's complaint on motion to dismiss where the complaint, "while framed in constitutional terms, grows out of an alleged violation of the CBA").

operation as a joint venture among its member clubs and that these rules and practices may affect Player's relationship to the League and its member clubs").

The NFL Rules set forth detailed standards for player equipment and uniforms. *See* 2017 Official Playing Rules of the NFL, Exhibit 1 to the Declaration of Lawrence P. Ferazani Jr. (filed concurrently herewith) ("Official Playing Rules"). Relevant here, the NFL Rules specifically address the type of player equipment, including eye shields, that players may wear during games, as well as the procedures that players must follow to obtain approval for such equipment:

> **Item 1. Helmet, Face Protectors.** Helmet with all points of the chin strap (white only) fastened and facemask attached. Facemasks must not be more than ⅝-inch in diameter and must be made of rounded material; transparent materials are prohibited. Clear (transparent) plastic eye shields are optional. ***Tinted eye shields may be worn only after the League office is supplied with appropriate medical documentation and approval is subsequently granted.*** The League office has final approval.

See Official Playing Rules, Rule 5, Section 4, Article 3 (emphasis added). The Rules also describe the consequences for noncompliance with the NFL's uniform and equipment standards. For violations "discovered during pregame warm-ups or at other times prior to the game, player will be advised to make appropriate correction; if the violation is not corrected, player will not be permitted to enter the game." *See* Official Playing Rules, Rule 5, Section 4, "Penalties."

In addition to the NFL Rules, the CBA contains numerous provisions that expressly govern the parties' rights and obligations regarding player health, safety, and medical care which bear directly on Plaintiff's claims here. Specifically, the NFL Player Contract provides that if a player "is injured in the performance of his services under [his] contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary." NFL Player Contract ¶ 9. The CBA further requires all clubs to employ "Club Athletic Trainers" who possess specific minimum qualifications and certifications set forth in the CBA. CBA Art. 39, §§

1-2. In addition, the CBA establishes a joint "Accountability and Care Committee" that provides "advice and guidance regarding the provision of preventative, medical, surgical, and rehabilitative care for players" (CBA Art. 39, § 3) as well as a "Joint Committee on Player Safety and Welfare" that is tasked with responsibility and oversight for "any subject related to player safety and welfare," including "playing equipment" and "playing rules." CBA Art. 50, § 1.

The NFL CBA mandates that "[a]ny dispute" "involving the interpretation of, application of, or compliance with, any provision of" the CBA, the NFL Player Contract, and "any applicable provision of the NFL Constitution and Bylaws or NFL Rules pertaining to the terms and conditions of employment of NFL players" must be resolved exclusively in accordance with bargained-for arbitration procedures. CBA Art. 43, § 1.

B. Plaintiff's Complaint

Plaintiff alleges that he suffers from a medical condition known as alopecia areata, which causes him to experience ocular photosensitivity and photophobia. Compl. ¶¶ 13-15. Plaintiff states that in order to reduce the effects of the ocular photosensitivity and photophobia while playing football, he requires the use of a protective shield in conjunction with his helmet and face guard. *Id.* ¶¶ 16-17. He alleges that he has used such a shield throughout his football career, with the Jets' permission. *Id.* ¶¶ 17-18.

Plaintiff states that before the start of an August 19, 2017 preseason game against the Detroit Lions, "an official of the NFL" refused to permit him to play in the game unless he removed the shield. *Id.* ¶¶ 19-23. Notably, Plaintiff does not allege that he sought an accommodation through the process required by the NFL Rules, including by submitting the required medical documentation establishing the need for the eye shield. *See generally*

Complaint ¶¶ 5-27. Instead, Plaintiff simply alleges, in conclusory fashion, that the official was "advised" of "Plaintiff's medical condition and the need to wear the protective shield." *Id.* ¶ 22.

Plaintiff played in the game without the shield and alleges that, "due to the lack of protection from the bright sun, [he] did not see an opposing player approach, and hence, was unable to take defensive maneuvers." *Id.* ¶¶ 27-28. He states that, as a result, "the opposing player made contact with Plaintiff's face causing severe and significant injury," including a broken orbital bone of the right eye. *Id.* ¶¶ 29-30.

Two years later, on August 19, 2019, Plaintiff filed this action against the NFL and five "John Doe" defendants in the Superior Court of New Jersey, Morris County asserting claims for (1) disability discrimination under the New Jersey Law Against Discrimination ("LAD"), (2) failure to provide a reasonable accommodation under the LAD and the Americans with Disabilities Act ("ADA"), and (3) negligence.[2]

Plaintiff claims that his medical condition constitutes a "disability" and that he sought a "reasonable accommodation" (the use of the protective shield) to enable him to "perform the requirements of his job." Compl. ¶¶ 24-25. By directing him to remove the shield, Plaintiff claims that the NFL "through its official denied Plaintiff a reasonable accommodation" in violation of the LAD and the ADA. Compl. ¶¶ 26, 44-48. Plaintiff further contends that the NFL, through the conduct of its officials, "breached its duty of care owed to Plaintiff to help him avoid injury while playing football" and is liable under a theory of *respondeat superior*. Compl. ¶ 50.

[2] On September 25, 2019, the NFL timely removed the case to this Court on the basis of federal question jurisdiction because (1) Plaintiff's Complaint raises claims arising under a federal statute and (2) Plaintiff's claims are completely preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). *See* Dkt. No. 1.

Plaintiff claims that, as a result of the NFL's alleged conduct, he "suffered injury including but not limited to severe personal injury, emotional distress and economic/pecuniary injuries." Compl. ¶¶ 43, 48; *see also* Compl. ¶ 51 (alleging that he suffered "severe and permanent personal injuries" as a result of the NFL's negligence).

ARGUMENT

I. PLAINTIFF'S STATE LAW CLAIMS SHOULD BE DISMISSED AS PREEMPTED BY THE LMRA

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), preempts state law claims that are "substantially dependent" on, or "inextricably intertwined" with, the terms of a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11, 213, 220 (1985); *Teamsters Local 174 v. Lucas Flour Co.,* 369 U.S. 95, 103 (1962). "The question in a preemption analysis is not whether the source of a cause of action is state-law," but rather whether "resolution of the cause of action requires interpretation of a collective bargaining agreement's terms." *Snyder v. Dietz & Watson, Inc.*, 837 F. Supp. 2d 428, 439 (D.N.J. 2011); *see also Angst v. Mack Trucks, Inc.*, 969 F.2d 1530, 1536 (3d Cir. 1992) (federal law preempts state law "if the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement"). This includes documents incorporated by reference into the CBA, such as the CBA-prescribed NFL Player Contract and the NFL Rules. *See Maher v. N.J. Transit Rail Ops., Inc.*, 593 A.2d 750, 763-64 (N.J. 1991) (state law discrimination claims preempted where resolution of the claims depended on safety rules incorporated into the CBA); *Carluccio v. Parsons Inspection & Maint. Corp.*, No. CIV A 06-4354 JLL, 2007 WL 1231758, at *4 (D.N.J. Apr. 24, 2007) (state law claim preempted where resolution was dependent on analysis of defendant's "policies and procedures," which were incorporated by reference into the CBA).

Moreover, "the primacy of arbitral resolution of industrial disputes" is a "centerpiece" of Section 301. *Voilas v. Gen. Motors Corp.*, 170 F.3d 367, 372 (3d Cir. 1999). Accordingly, because "a central tenet of federal labor-contract law under § 301 [is] that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance," once a claim is deemed preempted, it must be dismissed to "preserve[] the central role of arbitration in our system of industrial self-government." *Allis-Chalmers*, 471 U.S. at 219-20; *Snyder*, 837 F. Supp. 2d at 439 (dismissing state law claims after determining that they were preempted). These purposes are "so powerful as to displace entirely any state cause of action" that implicates the preemption principles of Section 301. *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.,* 463 U.S. 1, 23 (1983).

Here, all of Plaintiff's claims concern an injury that he asserts was caused when, in accordance with the NFL Rules, an NFL official refused to allow him to wear an eye shield during an NFL game. Because these allegations are inextricably intertwined with the NFL CBA and incorporated Rules, the LMRA preempts Plaintiff's state law claims and requires that this dispute be resolved exclusively through the arbitration procedures set forth in the CBA.

A. Plaintiff's Negligence Claim Is Preempted By The LMRA

To establish a claim for negligence, Plaintiff must prove that the NFL owed him a duty of care and breached that duty of care when the NFL "official" responsible for enforcing the rules refused to permit him to play in the game with his protective eye shield. *Robinson v. Vivirito*, 86 A.3d 119, 124 (N.J. 2014) (negligence claim requires establishment of a duty of care owed by the defendant to the plaintiff and a breach of that duty). Section 301 preempts negligence claims where, as here, the court must interpret the CBA to determine the "nature and scope of [any] duty" of care that the defendant agreed to assume and whether the defendant, by its actions,

breached that duty. *See Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 862 (1987); *Snyder*, 837 F. Supp. 2d at 442-43 (plaintiff's state law tort claims preempted where evaluation of the parties' respective rights and expectations required interpretation of the CBA).

Plaintiff's negligence claim clearly implicates these principles. Plaintiff contends that the NFL maintains a duty of care "to help him avoid injury while playing football," Compl. ¶¶ 49-55, and breached that duty when an official prohibited him from wearing a protective shield pursuant to League rules. But whether the NFL maintains a duty to "help [Plaintiff] avoid injury," if any, in this context, can only be ascertained by interpreting provisions in the CBA and NFL Rules, which carefully allocate responsibilities for player safety and medical care among the NFL, the NFLPA, the Clubs, the Club physicians, and the players. For instance, the Court must interpret the NFL Uniform and Equipment Rules, which state that tinted eye shields "may be worn only after the League office is supplied with appropriate medical documentation and approval is granted," to determine what duty, if any, the NFL assumed with respect to the use of such equipment and whether the official properly applied this rule when he refused to allow Plaintiff to use a protective eye shield without submitting the required documentation. *See* Official Playing Rules, Rule 5 § 4 Art. 3. These rules also bear on the issue of whether Plaintiff himself contributed to his injury by failing to seek approval to wear a protective shield through the process established under the rules for this very scenario.

Numerous courts have found negligence claims like Plaintiff's preempted where players have alleged that the League breached a "duty of care" that purportedly resulted in personal injury. For example, in *Maxwell v. National Football League*, No. CV 11-08394 (C.D. Cal. Dec. 8, 2011) (ECF No. 58), at 1-2, the court held that resolution of a player's negligence claim based on game-related injuries was "inextricably intertwined with and substantially dependent upon an

analysis of certain CBA provisions imposing duties on the clubs with respect to the medical care and treatment of NFL players."[3] Noting that "[t]he CBA places primary responsibility for identifying [] physical conditions on the team physicians," the court concluded that the claim was preempted because those provisions, as well as provisions relating to the Club athletic trainers, must be considered to determine "the degree of care owed by the NFL and how it relates to the NFL's alleged failure" to satisfy that duty. *Id.*; *see also Williams v. National Football League*, 582 F.3d 863, 881 (8th Cir. 2009) (finding negligence claims against the NFL for allegedly failing to warn players about the harmful effects of a dietary supplement preempted where the duty of care could not be determined "without examining the parties' legal relationship and expectations as established by the CBA and the [Steroid] Policy."); *Stringer v. National Football League*, 474 F. Supp. 2d 894, 910 (S.D. Ohio 2007) (holding negligence claims preempted because CBA interpretation was required to determine if any provisions "diminished" the "degree of care" that the NFL might otherwise owe to the player). Similarly, in *Duerson*, the plaintiff alleged that the NFL was liable for negligently causing his concussion-related injuries "by failing to fulfill its duty to ensure his safety." *Duerson v. National Football League*, No. 12 C 2513, 2012 WL 1658353 (N.D. Ill. 2012), at *3. In finding the claim preempted, the court reasoned that its resolution would require interpretation of numerous CBA provisions concerning player health and safety that were "directly relevant to the particular duty at issue." *Id.* at *5. Specifically, the court explained that those provisions could be interpreted to "impose a duty on the NFL's clubs to monitor a player's health and fitness to continue to play football," which would suggest that the NFL could, in turn, "reasonably exercise a lower standard of care." *Id.*

[3] *See* Exhibit 1 to the Declaration of Richard Hernandez.

Here, too, the provisions of the NFL's CBA must be interpreted to determine whether, if the NFL did have a duty to Plaintiff, it was in any way diminished by the CBA's allocation of responsibilities to the Union, the Club, the Club physician, the Joint Committee, the Accountability and Care Committee, and Plaintiff himself. Here, the Court must determine whether the NFL assumed and then breached a duty that the CBA and NFL Rules specifically delegate to the Clubs or, instead "reasonably rel[ied] on the club" and the Player to request an exemption for a protective eye shield if one was necessary. To do so, the Court must interpret not only the specific rules governing the use of tinted visors, but also those provisions of the CBA expressly delegating responsibility for player health and safety issues to other parties. For example, the Court would need to interpret Article 50 of the CBA, which provides for a "Joint Committee on Player Safety and Welfare" comprised of Club and NFLPA representatives responsible for oversight of "any subject related to player safety and welfare," including "playing equipment" and "playing rules." CBA Art. 50, § 1. The Court would also need to evaluate the role of the Accountability and Care committee established in Article 39 and the effect of the CBA's assignment of medical care responsibilities to Club physicians and athletic trainers on the scope of the League's duties to Plaintiff, if any. *See, e.g.,* CBA Art. 39, §§ 1-3; App. A ¶ 9.[4]

Plaintiff's claims also implicate Section 301's purpose to preserve "the primacy of arbitral resolution of industrial disputes." *Voilas,* 170 F.3d at 372. Whether Plaintiff should have

[4] The CBA and incorporated NFL Player Contract also comprehensively address the remedies available to players injured while playing football, which include: (1) the right to medical and rehabilitative care (CBA Art. 39; NFL Player Contract ¶ 9); (2) the guarantee of minimum workers' compensation benefits (CBA Art. 41); (3) the player's right to continued payment of his salary while injured for the duration of the season of injury (CBA Art. 44; NFL Player Contract ¶ 9); and (4) certain protection against the loss of salary beyond the season of injury (CBA Art. 45). These provisions, too, must be construed to determine what damages, if any, Plaintiff would be entitled to.

been permitted to wear the eye shield under NFL Rules plainly was required to be resolved exclusively through the CBA's mandatory arbitration procedures. *See* CBA Art. 43 (requiring that "a[ny] dispute . . . . involving the interpretation of, application of, or compliance with . . . any provision of the CBA . . . or NFL Rules pertaining to the terms and condition of employment of NFL players" must be determined solely in accordance with the CBA's mandatory grievance and arbitration provisions). He may not resort to a judicial forum to resolve this labor-management dispute. *See, e.g., Lukens Steel Co. v. United Steelworkers of Am.*, 989 F.2d 668, 672 (3d Cir. 1993) (citing *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (federal labor policy mandates resort to bargained-for arbitration unless it can be said "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," with any "[d]oubts … resolved in favor of coverage")). Accordingly, Plaintiff's negligence claim should be dismissed as preempted.

B. Plaintiff's State Law Disability Claims Are Preempted By The LMRA

Plaintiff's state law disability discrimination and failure to accommodate claims also cannot be resolved without interpreting the CBA and incorporated NFL Rules. Although courts have held that the LMRA does not preempt LAD claims involving solely "factual questions that do not turn on an interpretation of the CBA," the Third Circuit has expressly recognized that the LMRA will preempt LAD claims whose resolution requires interpretation of a CBA. *Rutledge v. Int'l Longshoremen's Ass'n AFL-CIO*, 701 F. App'x 156, 162 (3d Cir. 2017) (noting, in context of LAD, that "construction of a CBA term may prove necessary in some contexts to determine a plaintiff's qualification for a particular position"); *see also Opacity v. Aramark Corp.*, No. CIV.A.05CV5328(DMC), 2006 WL 1210531, at *1 (D.N.J. Apr. 28, 2006) (finding LAD claim

preempted because resolution of plaintiff's claims required interpretation of seniority provisions).

Here, Plaintiff's LAD claims indisputably require interpretation of the NFL CBA and the incorporated Rules. As a threshold matter, Plaintiff's employment discrimination claims depend on his allegation that the NFL acted as his "employer" at all relevant times. *See Thomas v. Cty. of Camden*, 902 A.2d 327, 334 (N.J. App. Div. 2006) ("the lack of an employment relationship between the plaintiff and the defendant will preclude liability" under the LAD). As a result, the Court must interpret the CBA to determine whether there is a "legally recognizable employment relationship between" Plaintiff and the NFL for purposes of the LAD as Plaintiff alleges. *Id.*; *Freeman v. Duke Power Co.*, 114 F. App'x 526, 532 (4th Cir. 2004) (finding wrongful discharge claim preempted where analysis of CBA was required to determine "what type of employment relationship existed" between the parties). Specifically, the Court would need to analyze and interpret numerous provisions of the CBA, incorporated NFL Player Contract, and NFL Rules to determine the nature and extent of control the NFL exercises over NFL players. *Thomas,* 902 A.2d at 335 (identifying "the employer's right to control" the employee as the most important factor in determining employee status under the LAD). Indeed, the NFL Player Contract entered into by all NFL Players and negotiated with the NFLPA, expressly states that the *Club,* and *not the NFL*, is the Player's employer. CBA App. A ¶ 2 ("Club employs Player as a skilled football player[,] [and] Player accepts such employment").

On the merits, Plaintiff's "disability discrimination" claim similarly cannot be resolved without interpreting the CBA and NFL Rules. Plaintiff asserts that the NFL discriminated against him by refusing to permit him to wear a protective eye shield. But even if Plaintiff could establish a *prima facie* case of discrimination (and as explained below, he cannot), the Court

would need to analyze the CBA and incorporated NFL Rules to determine whether the NFL had a legitimate, non-discriminatory reason for its alleged refusal to permit Plaintiff to wear the shield. *Viscik v. Fowler Equip. Co.*, 800 A.2d 826, 833 (N.J. 2002).

The New Jersey Supreme Court's decision in *Maher v. New Jersey Transit Rail Operations, Inc.* is controlling on this issue. 593 A.2d at 763-64. In *Maher*, the plaintiff, who was legally blind in one eye, claimed that his employer violated the LAD by refusing to exempt him from a safety rule requiring him to wear protective eyewear at all times while on duty. *Id.* at 753. The Court held that the Railway Labor Act, which has the same preemptive force as the LMRA,[5] preempted the LAD claim because evaluation of the employer's argument that it was justified in refusing to allow the employee to return to work unless he complied with the safety rule required consideration of the employer's "conduct in following provisions of the collective-bargaining agreement." *Id.* at 764; *see also Boldt v. N. States Power Co.*, 904 F.3d 586, 593 (8th Cir. 2018) (holding that resolution of the plaintiff's disability discrimination claim depended on whether the actions the employer took "were required according to its interpretation of the collective-bargaining agreement and its fitness-for-duty policy"); *Reece v. Hous. Lighting & Power Co.*, 79 F.3d 485, 487 (5th Cir. 1996) (finding discrimination claims preempted because, when the plaintiff attempts to show that the employer's reason is pretextual, "the CBA would have to be interpreted because [the plaintiff] would have to challenge [the defendant's] rights under the CBA").

Plaintiff's failure to accommodate claim also cannot be resolved without interpreting CBA provisions and NFL Rules. To establish a *prima facie* case of disability discrimination

[5] *Voilas*, 170 F.3d at 375 (quoting *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994)) (explaining that the standards for preemption under the RLA and LMRA are "virtually identical").

based on a failure to accommodate, Plaintiff must prove that (1) he was disabled and the NFL knew it; (2) he requested an accommodation or assistance; (3) the NFL did not make a good effort to assist; and (4) he could have been reasonably accommodated. *Armstrong v. Burdette Tomlin Mem'l Hosp.,* 438 F.3d 240, 246 (3d Cir. 2006). The LMRA preempts failure to accommodate claims where, as here, their resolution requires the court to determine the employer's obligations under the collective bargaining agreement with respect to making accommodations. *See, e.g.*, *Davis v. Johnson Controls, Inc.*, 21 F.3d 866, 868 (8th Cir. 1994) (LMRA preempted failure to accommodate claim that was directly related to the plaintiff's supervisor's authority under the CBA to make accommodations); *Cain v. Union Pac. R.R.*, NO. 97 C 1443, 1999 U.S. Dist. LEXIS 20174, at *7 (N.D. Ill. Dec. 29, 1999) (employee's failure to accommodate claim preempted because any accommodation must be made in accordance with collective bargaining agreement requirements relating to seniority).

Plaintiff's failure to accommodate claim also must be dismissed as preempted because he cannot establish his claim without interpreting the detailed NFL Rules directly applicable to his alleged accommodation request. For instance, to determine whether Plaintiff "requested an accommodation," the Court must interpret NFL Rules describing the process for obtaining approval to wear a tinted visor. Those Rules provide that tinted eye shields "may be worn only after the League office is supplied with appropriate medical documentation and approval is subsequently granted." *See* Rule 5, Section 4, Art. 3. Specifically, the Court must evaluate whether, in light of the Rule, the interaction between Plaintiff and the NFL official before the game constitutes a request. Similarly, the determination of whether or not the NFL "made a good effort to assist" necessarily requires analysis of NFL Rules allocating the responsibility for

obtaining the right to wear special equipment, such as tinted visors, among the players, the Club, and the NFL.

In sum, because resolution of Plaintiff's LAD claims plainly requires interpretation of the CBA and NFL Rules, they must be dismissed as preempted.

II. PLAINTIFF'S CLAIMS ARE BARRED BY WORKERS' COMPENSATION EXCLUSIVITY

The New Jersey Workers' Compensation Act ("WCA"), which provides the "exclusive remedy" for the type of workplace injury alleged here, further bars Plaintiff's claims. *See* N.J. Stat. Ann. § 34:15-8. The workers' compensation system involves a "trade-off whereby employees relinquish their right to pursue common-law remedies in exchange for automatic entitlement to certain, but reduced, benefits whenever they suffer injuries by accident arising out of and in the course of employment." *Fermaintt ex rel. Estate of Lawlor v. McWane, Inc.*, 694 F. Supp. 2d 339, 344 (D.N.J. 2010). Because Plaintiff alleges that the NFL is his "employer," his claims are subject to the workers' compensation exclusivity bar.

On its face, Plaintiff's Complaint establishes that his claims derive solely from injuries sustained "by accident" and "in the course and scope of his employment"—he asserts that he was injured by colliding with an opposing player during a play in a preseason game. Compl. ¶¶ 28-29, 43, 48, 51. These are precisely the types of workplace injuries that are subject to the exclusive jurisdiction of the workers' compensation system. *See, e.g.*, N.J. Stat. 34:15-1; *Pro-Football, Inc. v. Tupa*, 51 A.3d 544, 552 (Md. 2012) (holding that NFL player's injury to his back during warm-ups was an accidental injury incurred in the course and scope of employment); *Gambrell v. Kansas City Chiefs Football Club, Inc.*, 562 S.W.2d 163, 166-68 (Mo. App. 1978) (holding that NFL player's claims relating to injuries suffered when player was tackled in an exhibition football game were "squarely within the ambit" of the workers' compensation act); 2

Larson's Workers' Compensation Law § 22.04 (noting that injuries in professional sports "are so routinely treated as compensable" that they "seldom appear in reported appellate decisions").

Plaintiff cannot avoid the exclusivity bar by cloaking his claims in terms of disability discrimination or failure to accommodate. First, the ADA does not permit the recovery Plaintiff seeks, which is essentially personal injury damages stemming from the NFL's alleged failure to accommodate his claimed disability. *See, e.g.*, *Aponik v. Verizon Pa. Inc.*, 106 F. Supp. 3d 619, 625 (E.D. Pa. 2015) (granting motion for summary judgment on plaintiff's claim for bodily injury allegedly sustained as a result of employer's failure to accommodate disability); *McEwen v. UPMC Shadyside Presbyterian Hosp.*, No. 2:09-CV-1181, 2010 WL 4879195, at *7 (W.D. Pa. Nov. 23, 2010) (holding that plaintiff could not recover under the ADA for personal injuries allegedly caused by the employer's failure to assign him to a sedentary position). The remedy for such injuries "lies in tort or pursuant to the Worker's Compensation Act," not federal anti-discrimination laws. *Smith v. Blue Cross Blue Shield of Kansas, Inc.*, 102 F.3d 1075, 1078 (10th Cir. 1996).

Second, the WCA bars recovery for bodily injuries—including those alleged by Plaintiff here—except in the case of egregious employer conduct, such as where the employer knows that injury is substantially certain to result from that denial. This exception to the exclusivity presumption applies "in only rare and extreme factual circumstances." *Kibler v. Roxbury Bd. of Educ.*, 919 A.2d 878, 882 (N.J. App. Div. 2007). Thus, as the New Jersey Supreme Court has explained:

> [I]n order for an employer's act to lose the cloak of immunity of N.J.S.A. 34:15-8, two conditions must be satisfied: (1) the employer must know that his actions are substantially certain to result in injury or death to the employee, and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial

> employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize.

Laidlow v. Hariton Mach. Co., 790 A.2d 884, 894 (N.J. 2002).

Here, Plaintiff's allegations on their face fail to establish an exception to the exclusivity bar. Both Plaintiff's discrimination and negligence claims are premised solely on allegations sounding in negligence, and it is "contrary to the very definition of 'negligence' to categorize [such a] claim within the 'intentional wrong' exception to the WCA." *Birch v. Wal-Mart Stores, Inc.*, No. CV 15-1296 (CCC-JBC), 2015 WL 8490938, at *4 (D.N.J. Dec. 9, 2015) (Cecchi, J.). Moreover, Plaintiff's conclusory statement that the NFL's actions were "substantially certain to result in injury," without any supporting allegations, cannot plausibly demonstrate that the exception to workers' compensation exclusivity should apply. *See Shorter v. Quality Carrier*, Civil No. 14-4906 (RBK/JS), 2014 WL 7177330, at *3 (D.N.J. Dec. 16, 2014) (holding that the plaintiffs' "'threadbare recital' of the elements of an intentional wrong, coupled with legal conclusions," could not survive a motion to dismiss based on workers' compensation exclusivity) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Indeed, Plaintiff's alleged injury while playing professional football could not possibly be viewed as "plainly beyond anything the Legislature" intended to immunize. *See Bustamante v. Tuliano*, 591 A.2d 694, 699 (N.J. App. Div. 1991); *see also Gambrell*, 562 S.W.2d at 166-68. Accordingly, Plaintiff's claims, which are based on alleged injuries sustained during the course and scope of Plaintiff's employment, are barred by workers' compensation exclusivity as matter of law.

III. THE COMPLAINT FAILS TO STATE A CLAIM UNDER THE LAD OR ADA

In addition to being preempted and barred by workers compensation exclusivity, Plaintiff's state and federal disability claims fail as a matter of law.[6] To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[B]lanket assertion[s] of entitlement to relief" are insufficient, as are labels, conclusions, plainly false allegations, and formulaic recitations of the elements of a cause of action. *Id.* at n.5; *Ashcroft*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Accordingly, "a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to show such entitlement with its facts." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). Plaintiff's Complaint fails to satisfy these fundamental standards of pleading and should therefore be dismissed with prejudice.

A. Plaintiff Fails To State A Claim For Relief For Disability Discrimination

To state a claim for disability discrimination under the LAD and the ADA, Plaintiff must allege facts that, if proved, would demonstrate that: (1) plaintiff was "a disabled person within the meaning of the [statute]"; (2) plaintiff was "qualified to perform the essential functions of the position of employment, with or without reasonable accommodations"; and (3) plaintiff "suffered an … adverse employment action because of the … disability." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999); *see also Victor v. State*, 952 A.2d 493, 614-15 (N.J.

[6] Plaintiff's Complaint also fails to allege that he exhausted his administrative remedies, as he must do before filing an ADA complaint in court. *See* 42 U.S.C. § 2000e-5; 42 U.S.C. § 12117(a); *Churchill v. Star Enters.*, 183 F.3d 184, 190 (3d Cir. 1999). Under the ADA, a plaintiff must file a charge with the EEOC or New Jersey Division of Civil Rights within 300 days of the alleged discriminatory act and receive a "right to sue" letter before filing a lawsuit. 42 U.S.C. § 2000e-5(e)(1). A complaint does not state a claim upon which relief may be granted "unless it asserts the satisfaction of the precondition to suit specified by [the ADA]: prior submission of the claim to the EEOC for conciliation or resolution." *Robinson v. Dalton*, 107 F.3d 1018, 1022 (3d Cir. 1997).

Super. Ct. App. Div. 2008) (noting New Jersey courts "look to the substantive standards established under federal law for guidance, particularly the Americans with Disabilities Act"). Here, Plaintiff has failed to adequately allege facts that establish the first and third elements—that he is "disabled within the meaning of the statute" and he "suffered an adverse employment action because of a disability."

1. Plaintiff Has Not Alleged Facts That Would Establish That He Is "Disabled"

The threshold inquiry in a disability discrimination case is whether the plaintiff fits the statutory definition of "disabled." *See, e.g.,* 42 U.S.C. § 12112(a); *Jones v. United Parcel Serv.,* 214 F.3d 402, 406 (3d Cir. 2000) ("It is, of course, an axiom of any ADA claim that the plaintiff be disabled…."). However, "not every impairment will constitute a disability." 29 C.F.R. § 1630.2(j)(1)(ii). Rather, to qualify as a "disability" under the ADA, an employee must have a "physical or mental impairment that *substantially limits* one or more *major life activities*." 42 U.S.C. § 12102(1) (emphasis added); *see also id.* § 12102(2)(A) ("major life activities include . . . caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking"). The LAD applies the same restriction. *See, e.g., Victor v. State*, 4 A.3d 126, 143 (N.J. 2010) (quoting *Viscik*, 800 A.2d at 835)); *see also Adesanya v. Novartis Pharm. Corp.*, No. 2:13-cv-05564, 2016 WL 4401522, at *7 n.13 (D.N.J. Aug. 15, 2016) (finding plaintiff was not disabled under ADA or LAD due to "low back pain" that prevented her from commuting to her employer's offices in New Jersey).

Here, Plaintiff alleges that he has a skin condition known as alopecia areata that causes "photosensitivity or photophobia," but fails to allege facts to show how this condition "substantially limits" a "major life activity." Nor could he, as courts have routinely rejected claims that alopecia constitutes a disability for purposes of disability discrimination laws. *See,*

e.g., *Moskal v. Delphi Auto. Sys.*, 66 F. App'x 547, 549 (6th Cir. 2003) (holding alopecia was not a "disability" under the ADA because it did not substantially impair any major life activity); *Fee v. Mgmt. & Training Corp.*, 2013 WL 1145455, at *3 (D. Nev. Mar. 12, 2013) (dismissing discrimination claim based on skin condition because plaintiff had "not sufficiently alleged a disability under the ADA"); *cf. Bianco v. GMAC Mortg. Corp.*, No. 07-4650, 2008 WL 5003023, at *4 (E.D. Pa. Nov. 25, 2008) (dismissing disability discrimination claim on summary judgment because plaintiff did not establish that alopecia was a disability under the ADA).

Far from pleading that his medical condition "substantially limits" a major life activity, the only "life activity" alleged to have been limited by Plaintiff's medical condition is his ability to play in an NFL game during bright sunshine without a particular type of eye shield. Such an allegation falls far short of demonstrating that Plaintiff is "disabled" under either state or federal law. *See* 29 C.F.R. § 1630.2(j)(1)(ii) ("not every impairment will constitute a disability"); 42 U.S.C. § 12102(1); *Dancause v. Mt. Morris Cent. Sch. Dist.*, 590 F. App'x 27, 28-29 (2d Cir. 2014) (affirming dismissal of complaint where "short of reciting activities found in the statute that she could not 'adequately' perform, [appellant] did not allege any facts from which a court could plausibly infer that her [condition] substantially limited these major life activities"); *Popko v. Penn State Milton S. Hershey Med. Ctr.*, No. 1:13-CV-01845, 2014 WL 3508077, at *5 (M.D. Pa. July 14, 2014) (dismissing ADA claim because plaintiff "fail[ed] to actually plead how or which of his major life activities were affected"); *Signore v. Bank of Amer., N.A.,* No. 2:12cv539, 2013 WL 5561612, at 8 (E.D. Va. Oct. 8, 2013) (dismissing ADA claim because plaintiff failed to "provide specific information about any impact of her alleged impairment on her life's activities").

2. Plaintiff Has Not Alleged Any "Adverse Employment Action"

Plaintiff also pleads no facts to support the third element of his claim—that he suffered an adverse employment action because of his disability. To establish an adverse employment action, a plaintiff must allege more than "something that makes … [him] unhappy, resentful or otherwise cause an incidental workplace dissatisfaction." *Victor*, 952 A.2d at 505; *see also El-Sioufi v. St. Peter's Univ. Hosp.*, 887 A.2d 1170, 1187 (N.J. Sup. Ct. App. Div. 2005) (holding that employment action "unaccompanied by a demotion or similar action, is insufficient" to be "adverse"). Instead, Plaintiff must plead that a specific action "materially altered the terms and conditions of [his] employment" and "deprived [him] of any employment privileges or opportunities." *Richter v. Oakland Bd. Educ.*, 211 A.3d 1226, 1236 (N.J. Sup. Ct. App. Div. 2019). These typically include actions that result in an "employee's loss of status, a clouding of job responsibilities, diminution in authority, disadvantageous transfers or assignments, and toleration of harassment by other employees." *Mancini v. Twp. of Teaneck*, 794 A.2d 185, 207 (N.J. Sup. Ct. App. Div. 2002).

Plaintiff makes no such allegation here. Indeed, the only adverse action alleged by plaintiff is his contention that he was denied an accommodation, which led to his alleged personal injury. But it is well-established that this is not a cognizable injury under disability discrimination law. *See, e.g., Aponik,* 106 F. Supp. 3d at 625 (ADA does not provide remedy for personal injury allegedly caused by violation of statute); *Smith*, 102 F.3d at 1078 (same); *Richter,* 211 A.3d at 1236 (personal injury allegedly caused by employer's failure to accommodate disability is not "adverse employment action" under LAD). His disability discrimination claim accordingly fails as a matter of law.

B. Plaintiff Fails To State A Claim For Failure To Accommodate

Plaintiff also has failed to state a "failure to accommodate" claim under the disability laws. To state such a claim, Plaintiff must first allege sufficient facts to satisfy the elements of disability discrimination claim, which, as explained above, he has not. *See Rich v. Verizon N.J. Inc.*, No. 16-1895, 2017 WL 6314110, at *21 (D.N.J. Dec. 11, 2017) ("Plaintiff must first establish a prima facie case of discrimination under the ADA in order to recover for an alleged failure to accommodate.").

Even if Plaintiff can make this threshold showing, he also must allege facts that demonstrate he "requested accommodations or assistance for [his] disability," and that his "employer made no good faith effort to assist." *Fitzgerald v. Shore Mem. Hosp.*, 92 F. Supp. 3d 214, 237 (D.N.J. 2015) (ADA); *see also Royster v. New Jersey State Police*, 152 A.3d 900, 910 (N.J. 2017) (to state failure to accommodate claim under the LAD, plaintiff must show he made his employer "aware of the basic need for an accommodation," yet his employer "failed to provide a reasonable accommodation"). Plaintiff has not met this standard here. His lone allegation relating to his accommodation claim—that "he sought a reasonable accommodation *i.e.* the use of the protective shield in order for him to perform the requirements of his job"—is entirely conclusory and insufficient to save the claim. *See Semple v. Donahoe*, No. Civ. A. 13–5198 (ES), 2014 WL 4798727, at *3 (D.N.J. Sept. 25, 2014) (dismissing failure to accommodate claim where "pleadings completely omit the elements of disability discrimination in favor of broad-brush, conclusory allegations").

More fundamentally, Plaintiff's claim fails as a matter of law because he has not pled that he sought an accommodation through the NFL's established procedures, or that he satisfied the tinted visor Rule's requirement that he provide medical documentation. Both are fatal to a failure to accommodate claim. "[O]nce an employer has established a fixed set of procedures to

request [an] accommodation[], the plaintiff employee's failure to file a request through this procedure" precludes him from bringing a claim for failure to accommodate. *Davis v. George Washington Univ.*, 26 F. Supp. 3d 103 (D.D.C. 2014) (granting summary judgment to defendant because of plaintiff's failure to utilize established procedures to request accommodation); *see also Nunez v. Lifetime Prods., Inc.*, No. 1:14-cv-00025, 2016 WL 11189807 at *4-5 (D. Utah, Sept. 13, 2016) (plaintiff cannot establish failure to accommodate claim where he "fails to follow the established procedure for requesting an accommodation"). A plaintiff likewise cannot prevail on a failure to accommodate claim where he does not respond to an employer's request for medical documentation. *See* 29 C.F.R. § 1630.9, app. (2016) ("When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation"); *see also, e.g., Bundy v. Chaves Cty. Bd. Of Comm'rs,* 215 F. App'x 759, 762 (10th Cir. 2007) ("[B]y failing to respond to the repeated requests for [medical] documentation concerning his ability to return to work, [plaintiff] never triggered the Board's duty to consider [a reasonable accommodation]"); *May v. Roadway Express, Inc.,* 221 F. Supp. 2d 623, 628 (D. Md. 2002) (failure to respond to request for medical documentation "is fatal to [a] failure to accommodate claim").

Here, other than the conclusory allegation that the NFL official at the game was "advised" of Plaintiff's purported disability, the Complaint contains no allegation that Plaintiff provided any medical information, let alone the documentation required by the NFL Rules, showing either that he has a covered disability or that he needed an accommodation. Plaintiff accordingly cannot establish a failure to accommodate claim under the LAD or ADA as a matter of law.

CONCLUSION

For all of these reasons, the Court should dismiss Plaintiff's Complaint in its entirety.

Dated: October 16, 2019

Respectfully submitted,

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